

My Fritz

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION)	FINAL ORDER
NO. 30542 BY EDMUND AND)	
LORETTA WALTON)	

* * * * *

There being no exception or objection to the Proposal for Decision entered in this matter, the same is hereby made final and is expressly incorporated herein.

WHEREFORE, subject to the terms hereof, Application for Change of Appropriation Water Right No. 30542 is hereby approved to authorize Edmund and Loretta Walton to change the place of use of the whole of an existing right from the E1/2 NE1/4 of Section 19, and the SE1/4 SE1/4 of Section 18, Township 26 North, Range 44 East to 100 acres more or less located in the E1/2 E1/2 SE1/4 of Section 28, and the W1/2 NW1/4 and the N1/2 SW1/4 of Section 30, and the E1/2 E1/2 NE1/4 of Section 25, and the W1/2 W1/2 SW1/4 of Section 19, all in Township 26 North, Range 44 and 43 East. Authority is also given to the named appropriators to change the point of diversion of such existing right from the NE1/4 SE1/4 NE1/4 of Section 19 to the NE1/4 NW1/4 SW1/4 of Section 30, all in Township 26 North, Range 44 East, in McCone County.

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This authorization is subject to the following express conditions, limitations, and restrictions.

- (A) The named appropriators shall not use more than 20 cubic feet per second nor more than 200 acre-feet per year of the waters of Pasture Creek for the irrigation of the new place of use, and shall further not use the waters thereof prior to March 1 of any year nor subsequent to November 15 of any year.
- (B) The named appropriators shall install gated inlet devices or their equivalent in the dikes to be constructed on the new place of use such that the waters accumulating behind such dikes may be let down for downstream use.

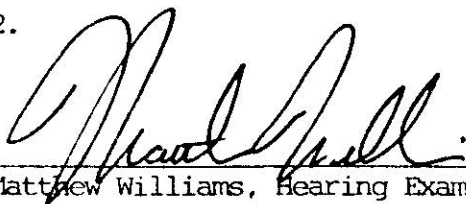
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 7 day of June, 1982.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 2872



Matthew Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE

FINAL ORDER

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Cheryl Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on June 7, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Edmund & Loretta Walton, Application No. 30542, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Edmund & Loretta Walton, Box 191, Fort Peck, MT 59223
2. Loretta Dunn, c/o Charles Dunn, Fort Peck, MT 59223
3. Francis McCarvel, Box 388, Glasgow, MT 59230
4. Vivian Lighthizer, Glasgow Field Office (inter-dept. mail)
5. Matt Williams, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA)

by Cheryl Wallace

) ss.

County of Lewis & Clark)

On this 7 day of June, 1982, before me, a Notary Public in and for said State, personally appeared Cheryl Wallace, known to me to be the Typist, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohm
Notary Public for the State of Montana

Residing at Montana City

My Commission Expires 3/1/85

CASE # 30542

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	PROPOSAL FOR DECISION
RIGHT NO. 30542 BY)	
EDMUND AND LORETTA WALTON)	

* * * * *

Pursuant to the Montana Water Use Act and the to contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Glasgow, Montana.

STATEMENT OF THE CASE

The application in this matter seeks to change the point of diversion and place of use of an existing water right. The point of diversion is to be changed from the NE1/4 SE1/4 NE1/4 of Section 19, Township 26 North, Range 44 East, all in McCone County to a point in the NE1/4 NW1/4 SW1/4 of Section 30, Township 26 North, Range 44 East, all in McCone County. The historic place of use of the existing water right is alleged to be the E1/2 NE1/4 of Section 19, and the SE1/4 SE1/4 of Section 18, all in Township 26 North, Range 44 East. This application seeks the right to use the waters historically applied to said acreage on the E1/2 E1/2 SE1/4 of Section 24; and the W1/2 NW1/4 of Section 30; and the N1/2 SW1/4 of Section 30; and the E1/2

E1/2 NE1/4 of Section 25, and the W1/2 W1/2 SW1/4 of Section 19; all in Township 26 North, Range 44 and 43 East, in McCone County. The Applicants appeared personally in this matter.

The pertinent portions of this application were duly and regularly published for three successive weeks in the Circle Banner, a newspaper of general circulation, printed and published in Circle, Montana.

On January 23, 1981, an objection to the granting of the instant application was filed with the Department of Natural Resources and Conservation by Loretta M. Dunn. This objection alleges generally that Applicants have no right or interest to the water right that is the subject of the present application, and that Applicant is in any event a junior appropriator with respect to this objector's water use. This objector appeared at the hearing through Charles Dunn, and was represented by Counsel Matthew Knierim of Gallagher, Archanbeault and Knierim.

The Department of Natural Resources and Conservation was represented at the hearing by Vivian Lighthizer, the Department's Area Office Supervisor for the Glasgow field office.

FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons involved.

2. The source of supply involved herein is Pasture Creek, which flows sporadically at times of melting snow or summer rainfall.

3. The Applicants have historically irrigated approximately 100 acres of land located in the E1/2 NE1/2 of Section 19 and the SE1/4 SE1/4 of Section 18, Township 26 North, Range 44 East, and have diverted water for such use at a point in the NE1/4 SE1/4 NE1/4 of Section 19, Township 26 North, Range 44 East, all in McCone County.

4. The Applicants have historically cultivated alfalfa hay at such place of use throughout the growing season, and have used up to 20 cubic feet per second up to 200 acre-feet per year by a dike-spreading water system.

5. The area proposed to be irrigated by the Applicants is of approximately 100 acres, and is with a similar type of soil to the historic place of use.

6. The Applicants intend to cultivate alfalfa hay substantially throughout the growing season upon the new place of use by means of a dike-spreading water system.

7. The Objector Loretta Dunn has historically used the waters of Pasture Creek for irrigation purposes.

8. The Applicants proposed place of use for their existing water right is upstream from lands historically irrigated by Loretta Dunn, whereas the existing place of use is downstream from such place of use.

9. The change of the existing right as proposed herein will

not result in adverse effect to the rights of other persons.

CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein, and by the appearance of the parties, has jurisdiction over the persons involved herein. See generally, MCA 85-2-402(1981).

2. The Department must approve the Applicants' proposed change if such change "will not adversely affect the rights of other persons." MCA 85-2-402(2)(1981).

3. The Applicants have an existing right to the use of up to 20 cubic feet per second up to 200 acre-feet per year of the waters at Pasture Creek for the irrigation of 100 acres more or less located in the E1/2 NE1/4 of Section 19, and the SE1/4 SE1/4 of Section 18, all in Township 26 North, Range 44 East. The point of diversion for such historic water use has been located in the NE1/4 SE1/4 NE1/4 of Section 19, Township 26 North, Range 44 East, all in McCone County.

4. That the proposed place of use is comprised of substantially identical acreage to the historic place of use, and that the type of use and the manner of use will be consistent with historic practice. The Applicants will not enlarge their historic use by virtue of the change proposed herein.

5. The proposed change of place of use and point of diversion will not adversely affect the rights of other persons, so long as gated inlets or similar structures are built into the

dike-spreading water system on the new place of use. Much of the testimony and evidence propounded at the hearing in this matter purported to establish either the Applicants or the Objector as the holder of the senior water right in this matter. The determination of priorities and the adjudication of existing water rights are not matters of administrative concern. The legislature in this state has created water courts for the resolution of these issues, and an adjudication process to assure that such issues are ultimately resolved. See generally, MCA 85-2-211(1981). Any administrative determinations by the Department cannot infringe upon such judicial questions, and this Department's disposition in this matter before it necessarily remains subject to and subservient to any decree entered pursuant to the adjudication process. See MCA 85-2-313(1981), MCA 85-2-312(1981).

The record reflects that the priority between Applicants and the Objector is in large measure immaterial. The evidence shows that for the most part the flows of Prairie Creek at times of run-off are sufficiently high in volume that both the objector to this matter and the Applicants will be able to divert their historic share. Indeed, during early spring months, the record demonstrates that there is such an abundance of water as to create drainage problems downstream from Applicants' historic place of use. Therefore, this issue of priority will only arise as to those summer rains providing insufficient water to irrigate both parties' historic places of use.

It is not necessary, however, to resolve the issue of priority in the present circumstances. Even assuming that the Objector is junior to the Applicants' use, he nonetheless would be entitled to use the waters of Prairie Creek notwithstanding this priority at such times as Applicants or their successors in interest have no need of the water resource.

When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right or rights in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator or appropriators give way to his superior claim. Kirk v. Hudson, 110 Mont. 263, 283, 103 P.2d 137 (1940); See also Quigley v. McIntosh, 88 Mont. 103, 290 P.266 (1930).

Therefore, Applicants must install gated inlet boxes or their equivalent so as to assure that waters accruing behind the dike water-spreading system can be let down for downstream uses at least at such times when Applicants have no need of the water. No appropriator whatever the priority of his respective water use has the authority to waste the water resource.

The circumstances do not otherwise reflect any potential adverse effect from the change proposed herein, particularly since such change will make Applicants' return flows available to the Objector's use.

WHEREFORE, subject to the terms hereof, Application for Change of Appropriation Water Right No. 30542 is hereby approved to authorize Edmund and Loretta Walton to change the place of use

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of the whole of an existing right from the E1/2 NE1/4 of Section 19, and the SE1/4 SE1/4 of Section 18, Township 26 North, Range 44 East to 100 acres more or less located in the E1/2 E1/2 SE1/4 of Section 28, and the W1/2 NW1/4 and the N1/2 SW1/4 of Section 30, and the E1/2 E1/2 NE1/4 of Section 25, and the W1/2 W1/2 SW1/4 of Section 19, all in Township 26 North, Range 44 and 43 East. Authority is also given to the named appropriators to change the point of diversion of such existing right from the NE1/4 SE1/4 NE1/4 of Section 19 to the NE1/4 NW1/4 SW1/4 of Section 30, all in Township 26 North, Range 44 East, in McCone County.

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B) The named appropriators shall install gated inlet devices or their equivalent in the dikes to be constructed on the new place of use such that the

waters accumulating behind such dikes may be let down
for downstream use.

NOTICE

This Proposal for Decision is offered for the review
and comment of all parties of record. Objections and exceptions
must be filed with and received by the Department of Natural
Resources and Conservation on or before May 14, 1982.

DONE this 28th day of April, 1982.


Matthew Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962